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In The

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY OF PETITIONERS

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I. INTRODUCTION

Petitioners Home Builders hereby submit their reply brief in support of their petition for a writ of certiorari to review the judgment of the Court of Appeals in *Defenders of Wildlife v. E.P.A.*, 420 F.3d 946 (9th Cir. 2005) (App. 1-68), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006) (App. 134-158).[1]

Judge Kleinfeld explained, in dissenting from denial of rehearing, that this case should have been simple: "[Section 402(b)] is mandatory. Congress commands that the agency 'shall approve' state programs 'unless' one or more of nine conditions are not met. The 'shall/unless' formula makes the nine condition list exclusive, and courts cannot add conditions to the list." App. 149. Two years before *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ("*TVA*"), was decided, this Court interpreted similar statutory language in *Union Electric Co. v. E.P.A.*, 427 U.S. 246 (1976), holding that "shall" means "shall." There, the Court considered EPA's obligation to approve state implementation plans under Section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 7410(a)(2):

> The provision sets out eight statutory criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, [EPA] "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that [EPA] is not to be concerned with factors other than those specified, . . . and none of the eight factors appears to permit consideration of technological or economic infeasibility.

Union Electric, 427 U.S. at 257 (citation omitted).

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[1] Home Builders will use the same abbreviations and conventions as were used in their petition. The key statutes at issue are Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, and Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536.

In this case, there is no dispute that (1) Arizona's program submission satisfied the nine statutory criteria in CWA Section 402(b), and (2) those criteria do not include impacts on endangered species. The panel majority concluded, however, that ESA Section 7(a)(2) "independently empowers EPA to make pollution permitting transfer decisions on behalf of listed species." App. 47. Thus, notwithstanding the plain language of Section 402(b), EPA cannot approve Arizona's program without "sufficient substitutes for section 7's consultation and mitigation mandates." App. 52.

In the CWA, "Congress struck a careful balance among competing policies and interests" and "protected certain sovereign interests of the States." *Arkansas v. Oklahoma*, 503 U.S. 91, 106-07 (1992); *see also* 33 U.S.C. § 1251(b); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166-67, 173-74 (2001). This includes the right to administer the NPDES program if the state's program satisfies the criteria in Section 402(b). *See E.P.A. v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 208 (1976).[2]

In short, the Ninth Circuit has overridden Congress' statutory mandate in Section 402(b). In order to reach that result, the court reinterpreted Section 7(a)(2), reading into that statute new powers that federal agencies must exercise to benefit endangered species. *See* App. 30-38. No court previously has held that Section 7(a)(2) constitutes "a font of new authority" that overrides specific statutory

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[2] Respondents suggest that because the overall objective of the CWA is consistent with the ESA (Resp. Br. at 6), and because other CWA provisions, such as Section 303, 33 U.S.C. § 1313, governing adoption and revision of state water quality standards, mention fish and wildlife (*id.* at 7-8), the nine statutory criteria in Section 404(b) are not exclusive. Where Congress has provided EPA with discretionary authority to act for the benefit of listed species, Section 7(a)(2) applies. *See* 50 C.F.R. § 402.03. EPA plainly lacks such discretionary authority under Section 402(b), however.

mandates. *American Forest and Paper Ass'n v. E.P.A.*, 137 F.3d 291, 297-99 (5th Cir. 1998) ("*AFPA*"); *see also Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C.*, 962 F.2d 27, 33-34 (D.C. Cir. 1992); App. 66-68 (Judge Thompson dissenting), 145-48 (Judge Kozinski dissenting); Home Builders' Pet. at 13-20.

II. THERE IS AN UNDENIABLE CONFLICT BETWEEN THE CIRCUITS THAT THIS COURT SHOULD RESOLVE.

Respondents make no attempt to defend the panel majority's belief that a conflict previously existed between four circuits (App. 44-47), and instead argue that there is no conflict at all. Respondents' hair-splitting explication notwithstanding, there is an undeniable conflict between *AFPA* and the Ninth Circuit's opinion in the instant case. The Ninth Circuit held that EPA could not approve Arizona's program without "sufficient substitutes for section 7's consultation and mitigation mandates." App. 52. The Fifth Circuit held in *AFPA* that EPA could not condition its approval of Louisiana's NPDES program on the inclusion of such substitutes. 137 F.3d at 293-94, 297-99. Unless the Court intercedes, EPA will be acting contrary to either the Ninth Circuit's or the Fifth Circuit's direction when it acts on the next state NPDES program submission.[3]

The conflict with *Platte River* is also clear, even under Respondents' characterization of that case: If *either* ESA Section 7(a)(1) *or* 7(a)(2) authorized FERC to impose conditions

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[3] Respondents, in an apparent effort to minimize this conflict, inaccurately describe the opinion below as merely requiring EPA and FWS to "assess" whether the state NPDES program approval will jeopardize species or destroy critical habitat. *Compare* Resp. Br. 22 *with* App. 47, 52. Indeed, it is apparent from the record that FWS employees wanted to develop a "process" similar to the process held unlawful in *AFPA*. *See* App. 569-71.

that exceeded FERC's authority under the Federal Power Act, then the D.C. Circuit would not have rejected claims of the petitioners there that such conditions were mandated by the ESA. *Compare* Resp. Br. at 19-20 *with Platte River,* 962 F.2d at 30, 33-34.

Last year, the Eighth Circuit addressed *Platte River* in deciding whether Section 7(a)(2) applied to the operation of the Missouri River reservoir system by the Army Corps of Engineers under the Flood Control Act of 1944. *In re Operation of the Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005). After summarizing the facts of the case, the Eighth Circuit concluded that *Platte River* "affirmed that the ESA does not apply where an agency has no statutory authority to act with discretion." *Id.* at 630. The Fifth Circuit read *Platte River* the same way. *AFPA*, 137 F.3d at 299. Home Builders submit that the Eighth and Fifth Circuits are correct.

III. SECTION 7(a)(2) DOES NOT OVERRIDE NON-DISCRETIONARY MANDATES IMPOSED BY CONGRESS.

In 1986, FWS and the National Marine Fisheries Service ("the Services") promulgated rules governing ESA Section 7(a)(2) that implemented the 1978, 1979 and 1982 ESA amendments. *Interagency Cooperation; Final Rule,* 51 Fed. Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402) (App. 318-480). This rulemaking included 50 C.F.R. § 402.03 (App. 459), which limits the application of Section 7(a)(2) to actions in which there is "discretionary Federal involvement or control," and 50 C.F.R. § 402.16 (App. 479-80), which requires the reinitiation of consultation under Section 7(a)(2) "where discretionary Federal involvement or control over the action has been retained or is authorized by law." The Services' interpretation is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Respondents' only response is that the Court should disregard this rulemaking, which has governed the applicability of Section 7(a)(2) for 20 years, because EPA did not cite it to the circuit panel. Resp. Br. at 27-28. However, as Judge Thompson explained in his dissent, prior to this case the Ninth Circuit consistently evaluated whether an agency possessed or retained sufficient discretionary authority to trigger the application of Section 7(a)(2) in accordance with these rules. App. 64-65.

Instead of squarely addressing the Services' rules, Respondents, like the panel majority, rely principally on this Court's broad *dicta* in *TVA* (Resp. Br. at 2-4, 24-25), and accuse both Petitioners of arguing that this Court should "rewrite" Section 7(a)(2) by inserting the limitation "utilize their authorities" (Resp. Br. at 26). As originally enacted, however, Section 7 imposed two obligations on federal agencies: (1) to carry out programs for the conservation of listed species and (2) to ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species or destroy critical habitat, and both obligations were qualified by the phrase "utilize their authorities." Endangered Species Act of 1973, § 7, 87 Stat. 982 (App. 483). This Court interpreted and applied this version of Section 7 in *TVA*. 437 U.S. at 160.

When Congress amended the ESA in 1978 and 1979, it separated Section 7 into subsections, but explained that this revision merely restated "existing law." H.R. Conf. Rep. No. 95-1804, at 18 (1978) (App. 487). Moreover, Congress has never amended its policy declaration that all agencies "shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1) (App. 183, 482). The Services explained in their 1986 rulemaking that "Federal agency authority and responsibility under section 7 have remained virtually intact from the 1973 Act." App. 320. Thus, there is no particular significance to the placement of the phrase.

In short, nothing in the ESA or its legislative history suggests that Section 7(a)(2) is superior to all other laws

or that Congress authorized agencies to ignore specific, non-discretionary mandates, nor is there any basis to disregard the Service's long-standing regulatory interpretation of the provision's applicability.

IV. EPA'S DECISION TO CONSULT ON ARIZONA'S PROGRAM IS NOT RELEVANT TO DECIDING THE PETITIONS.

Respondents devote much of their brief to their inaccurate assertion that the federal agencies' current position on the applicability of Section 7(a)(2) to EPA action under CWA Section 402(b) is a "newly minted" post hoc rationalization. The question of whether Section 7(a)(2) overrides EPA's obligation to approve state NPDES programs was part of EPA's decision to approve Arizona's program, the issue was squarely raised below by both the State of Arizona and Home Builders, and it was argued and decided by the Ninth Circuit. As Judge Kozinski explained (App. 137-41), the fact that EPA elected to consult with FWS did not preclude EPA from ultimately deciding that the ESA is inapplicable to state program approvals.

Respondents suggest that EPA's position conflicts with the 2001 memorandum of agreement between EPA and the Services on inter-agency coordination. Resp. Br. at 9. But the agreement does not squarely address whether Section 7(a)(2) applies to state NPDES program approvals. *See* App. 268-317. In the Federal Register notice (not the agreement), the agencies stated only that it was EPA's "current practice" to consult with the Services, and that consultations would be conducted "on a case-by-case basis." App. 260. The agencies also acknowledged the Fifth Circuit's decision in *AFPA*, and indicated that the agreement does *not* place any conditions on approval of state NPDES programs. App. 266.

Respondents also erroneously contend that EPA "has routinely conducted Section 7(a)(2) consultations" prior to approving state programs. Resp. Br. at 9. In fact, prior to this case, EPA consulted with the Services on only five

occasions, beginning with the approval of South Dakota's application in 1993. *See* App. 7 n.3. In contrast, EPA did *not* consult in approving programs for 39 other states. *Id.* A number of those states received multiple program approvals, resulting in *more than 100 opportunities* to apply Section 7(a)(2). *See Notice of Approval of Application by Texas to Administer the NPDES Program*, 63 Fed. Reg. 51,164, 51,200 (Sept. 24, 1998) (table listing state NPDES program status).[4] Consequently, Respondents' contention that EPA has had a long-standing policy of applying Section 7(a)(2) to state NPDES program applications is incorrect.

V. THERE IS NO EVIDENCE THAT ARIZONA'S NPDES PROGRAM ADVERSELY AFFECTS LISTED SPECIES.

In an attempt to make this case look like *TVA*, Respondents provide an inaccurate description of the administrative record, claiming FWS "predicted that the transfer could lead to the extinction of one or more species" (Resp. Br. at 1) and suggesting that species are likely to become extinct if Arizona administers the NPDES program. The record does not support this characterization.

After contacting FWS and obtaining a species list (which included every listed species of plant and animal possibly found in Arizona, including desert cactus and other non-aquatic species), EPA prepared a biological evaluation. App. 583-623. Respondents claim EPA determined that 60 species "could be harmed" under Arizona's NPDES program. Resp. Br. at 10-11. EPA actually concluded that approval of Arizona's program is not likely to adversely affect any listed species or any designated critical habitat. App. 584-85. EPA stated its action "is an

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[4] Multiple approvals are the result of states seeking approval to administer different portions of the NPDES program at different times, as shown in the table. The total number of state program approvals without consultation is 114.

administrative shift of authority and is not associated with any physical action that will alter habitat or affect biota." App. 615, 617. Although Section 7(a)(2) does not apply to state-issued permits (Resp. Br. at 11), EPA explained that "[b]ecause the substantive CWA protections currently afforded to Federally-listed species and critical habitat under the NPDES permit program will continue under the AZPDES permit program, [EPA] expects that any potential adverse effects to Federally-listed species or critical habitat would be insignificant and/or discountable." App. 616.

Respondents also claim that approval of Arizona's program "in the absence of effective State or other safeguards" would have a "devastating effect" on listed species and may actually jeopardize the continued existence of "several species." Resp. Br. at 11. The phrase "devastating effect" is culled from a five-sentence e-mail communication, in which an FWS employee speculated about the impacts of future housing developments on *groundwater supplies*. Resp. Ct. App. Excerpts of Record ("Resp. ER") at 64. He did not identify any future impacts caused by discharges of pollutants into jurisdictional surface waters authorized by state-issued NPDES permits.

In the October 2002 interagency elevation document, which sets forth the positions of the FWS field office and EPA Region 9 concerning the effects of Arizona's program, FWS stated it was concerned about "*non-water-quality-related impacts*" to two listed species, the Pima pineapple cactus and the pygmy-owl, resulting from future projects that may disturb those species' "habitat." App. 562-63. The Pima pineapple cactus is found in southern Arizona and northern Sonora and grows in alluvial basins and hillsides in Sonoran desertscrub and semi-desert grasslands.[5] The

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[5] *See* FWS background documents available at http://www.fws.gov/southwest/es/arizona/pima.htm (visited Nov. 30, 2006). The Pima pineapple cactus is currently being reviewed to determine whether it is a valid taxonomic entity. *See Notice of Status Review*, 70 Fed. Reg. 5,460, 5,461-62 (Feb. 2, 2005).

pygmy-owl is also a desert upland species, found primarily in Sonoran desertscrub vegetation and semi-desert grasslands.[6] Neither species' habitat is dependent on water quality. In fact, FWS and EPA agreed that there would be no adverse water-quality-related impacts caused by Arizona's NPDES program. App. 564.

Consequently, Respondents' attempt to make this case look like *TVA*, where completion of the Tellico Dam would extirpate an endangered species and destroy its critical habitat, is disingenuous. There is no evidence that any listed species would be adversely affected by Arizona's administration of the NPDES program. The record instead indicates that the genesis of this case was overzealous FWS employees attempting to use the NPDES program to override state and local land use regulation. EPA, in contrast, consistently maintained that approval of Arizona's program was merely a shift in administrative authority that would not alter any listed species' habitat, and that its ability to act for the benefit of listed species was constrained by the CWA. *E.g.*, App. 564-65, 595-96; *see Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767-70 (2004).

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[6] *See* FWS background documents available at http://www.fws.gov/southwest/es/arizona/Cactus.htm (visited Nov. 30, 2006). Earlier this year, FWS removed the pygmy-owl from the list of endangered and threatened species. *Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife*, 71 Fed. Reg. 19,452 (April 14, 2006).

VI. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Home Builders' Petition, Home Builders respectfully urge the Court to grant certiorari and review the judgment of the Court of Appeals in this case.

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Respectfully submitted,

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